

Town Law § 64(5); Public Officers Law § 42(3); Constitution Article 6, § 17(d)

A vacancy created by not placing the position of town justice on the ballot cannot be filled by town board appointment. It can be filled before the November 2013 general election only by special election if the Governor chooses to call for one. The term of the justice will commence January 1, 2014 in either case.

June 17, 2013

Raymond A. Meier
Town Attorney
Town of Lowville
Bond, Schoeneck & King, PLLC
501 Main Street
Utica, New York 13501-1245

Informal Opinion
No. 2013-4

Dear Mr. Meier:

You have requested an opinion relating to a vacancy in the office of town justice. The term of the town justice expired on December 31, 2012 but the office was not included on the November ballot. The office thus currently is vacant.¹ You have asked several related questions about filling the vacancy and the term of the new justice. As explained below, we are of the opinion that the only way the vacancy can be filled before the November 2013 general election is by special election called by the Governor, who has discretion to decide whether and when to do so. We are of the further opinion that the term of the new justice will be four years, beginning January 1, 2014, whether elected at the general or a special election.

In general, when there is a vacancy in a town office, the town board is authorized to appoint a qualified person to fill the vacancy. Town Law § 64(5). The term of such an appointment is provided by that statute. When the vacancy is in an elective position, an appointee filling the vacancy serves until January 1 following the first annual election at which the vacancy can be filled. *Id.* Thus, if Town Law § 64(5) were applicable in this case, a person appointed between now and the election day in November 2013 would serve until January 1, 2014.

Under the particular facts here, however, we are of the opinion that Town Law § 64(5) does not apply, and instead the filling of the vacancy is governed by Public Officers Law § 42(3), and can be accomplished only by a special election

¹ A judicial officer cannot hold over after the expiration of his term, and thus the position is literally vacant as well as vacant for purpose of choosing a successor. Public Officers Law § 5. You have advised that the Town has a second justice, who now is presiding over all town cases.

called by the Governor. That statute provides that, "[u]pon the failure to elect to any office, except that of governor or lieutenant-governor, at a general or special election, at which such office is authorized to be filled . . . the governor may in his or her discretion make proclamation of a special election to fill such office."

Although we have found no direct precedent applying this statute to a situation like the one present here, we believe that the plain language of Public Officers Law § 42(3) makes it applicable. The vacancy here was created when the term of a sitting justice expired, no candidate for the office had been placed on the ballot, and consequently the electors of the town failed to elect anyone to the office of town justice at a general election at which such office was authorized to be filled--precisely the situation described in Public Officers Law § 42(3). If a vacancy in a town elective office occurs for another reason, such as the death or resignation of the incumbent, the town board may fill the vacancy by appointment under Town Law § 64(5). But if the vacancy occurs because an election was held and the voters failed to elect anyone to the office, then Public Officers Law § 42(3) controls.

Moreover, this result makes sense. Although we are advised that the failure to include the position on the ballot in this case was inadvertent, such mistakes might become more frequent and even deliberate if the result were to give the town board the power to fill the vacancy by appointment instead of election. We therefore are of the opinion that the vacancy cannot be filled by town board appointment but can be filled before the November 2013 general election only by special election if the Governor chooses to call for one. If he does, he will establish the date of the special election. Public Officers Law § 42(3).

If a town justice is elected in a special election called by the Governor, the beginning and end of the term is governed by Article 6, § 17(d) of the Constitution. That provision states that "the justices of town courts shall be chosen by the electors of the town for terms of four years from and including the first day of January next after their election." That provision on its face specifies the precise term of any justice chosen by the town electors, whether in a general or special election. Accordingly, we are of the opinion that the term of the next town justice, whether elected at a special election called at the Governor's discretion before November 2013 or at the general election in November 2013, will begin on January 1, 2014 and run for four years from that time. *See Matter of Munnelly v. Newkirk*, 262 A.D.2d 781 (3d Dep't 1999) (four-year term constitutionally mandated whether election was result of expired term or to fill vacancy); *see also* Op. Att'y Gen. (Inf.) No. 90-76 (eliminated position of town justice can only be restored to commence on January 1).

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD
Assistant Solicitor General
in Charge of Opinions